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IN THE

Supreme Court of the United States.

OCTOBER TERM, ~~1952~~ 1953

No. ~~608~~ 23

WALTER J. KOWALSKI,

Petitioner,

vs.

ALBERT B. CHANDLER, Individually and as Commissioner of Baseball, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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THE COURT PRESS, 130 Cedar Street, N. Y. C.

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To the Honorable Fred M. Vinson, Chief Justice of the United States and Associate Justices of the Supreme Court of the United States.

Your petitioner respectfully shows:

I.

Statement of the Matter Involved.

The single question presented to this Court is whether professional baseball is subject to the Federal Anti-Trust Statutes of the United States.

The petitioner, the plaintiff, makes the following allegations in his complaint.

Petitioner is a professional baseball player capable of holding a position upon a club in Organized Baseball (R. 2). The defendants are officials and members of Organized Baseball (R. 2-3). Organized Baseball consists of the professional baseball clubs organized into leagues within the United States, the Dominion of Canada, Cuba and certain cities and towns in the Republic of Mexico.

Organized Baseball is governed by The New Major League Agreement, Major League Rules, Major-Minor League Rules and the National Association Agreement. The National and the American League comprise the Major Leagues of Organized Baseball. The National Association of Professional Baseball Leagues comprises the Minor Leagues of Organized Baseball (R. 3). The eight clubs in the National League and the eight clubs in the American League engage annually in scheduled games within their respective Leagues for profit which is derived by charging fixed prices for tickets of admission to members of the public and the fulfillment of these schedules requires the systematic crossing of state lines by the clubs (R. 4, 5, 6). The training and preparation for the season's schedule includes the interstate transportation of the clubs. The Major League clubs derive annually a substantial portion of their income from the sale to sponsors and to television companies of the right to broadcast and telecast their games (R. 5, 6). Many of the clubs in the Minor League make similar sales of this right (R. 7). Larger sums are received for the radio and television rights for the annual All Star or "Dream Game" between selected players of each Major League than are derived from the public for tickets of admission (R. 6). The

World Series played annually between the pennant winning clubs of each Major League yielded, in 1950, $975,000 from the sale of broadcasting and telecasting rights; an amount in excess of the $953,669.03 received from the public for tickets of admission (R. 7). The location of the Major League clubs or franchises has remained unaltered since 1903 as a result of the unanimous consent required from the owners of these clubs (R. 4).

Petitioner alleges in two separate causes of action that the defendants are in violation of the Sherman Anti-Trust Law (26 Stat. 209; 15 U. S. C. A., Sections 1, 2, 3) and the Clayton Act (38 Stat. 731; 15 U. S. C. A., Section 17).

The first cause of action alleges that the defendants have entered into a combination and conspiracy in restraint of interstate and foreign commerce and that they have conspired to monopolize professional baseball in the United States, the Dominion of Canada, Mexico and Cuba, thereby depriving plaintiff of the reasonable value of his services and of his opportunities for professional promotion through dealing with players as property and treating their labor as a commodity (R. 20).

The second cause of action alleges the same state of facts. Petitioner asserts that the defendants have entered into a combination and conspiracy in restraint of interstate and foreign commerce and that they have conspired to permit the unjust enrichment of defendant Brooklyn National League Baseball Club to plaintiff's damage through permitting it to employ plaintiff through its operation of its Minor League

clubs or "Farms" as a monopoly within a monopoly (R. 25).

Organized Baseball maintains its monopoly over the exhibition of professional games within its parks and over radio and television for profit in interstate and foreign commerce through its exclusive control over the market for professional players. The players are employed by their respective clubs under uniform contracts. These contracts contain a provision conferring upon the employing club an option for the player's services upon the expiration of his employment (R. 7). This option or reserve clause compels the player's adherence to his club under the sanction of a blacklist (R. 18), and through the reciprocal recognition of its binding force pursuant to agreement with an independent League in Mexico (R. 19) and through the inclusion within Organized Baseball of a League in Canada that was formerly independent (R. 20).

The uniform contract contains an assignment or involuntary transfer clause (R. 8). The New Major League Agreement, adopted January 12, 1921, did not prohibit "farming", *i. e.*, the ownership of Minor League Clubs by Major League clubs (R. 14, 15).

Salary ceilings for clubs throughout the Minor Leagues are the rule (R. 16, 17). The players on a "farm" are subject to assignment or involuntary transfer by its Major League club in conjunction with the reserve clause.

The Minor Leagues are composed of two "AAA" Leagues (R. 16), the Pacific Coast League having attained Open Classification since this action was

commenced; two "AA" Leagues; four "A" Leagues; nine "B" Leagues, thirteen "C" Leagues (R. 16, 17); and nineteen "D" Leagues (R. 16-17).

Under the Major-Minor League Rules (R. 3) a player is subject to annual selection by a club in a higher classification than his own (Major-Minor League Rules 5(g) [Hearings Before The Subcommittee on Study of Monopoly Powers of The Committee on The Judiciary—House of Representatives—82nd Congress—First Session, 1157 at 1163—hereinafter referred to as "Hearings"]).

Petitioner while under twenty-one signed his original uniform or standard contract with the Lockport, New York, Club of the "D" Pony League where he played one season for no more than $150 per month. Defendant, Brooklyn National League Baseball Club, Inc., thereafter purchased the assignment of petitioner's contract and he played in its organization in 1947 with Kingston, New York, in the "D" North Atlantic League for no more than $150 per month. For the season of 1948, petitioner's contract was assigned by the Brooklyn organization to the Pueblo, Colorado Club of the "A" Western League (R. 21). Petitioner played ultimately within the Brooklyn organization for its Three Rivers, Quebec, Club in the Dominion of Canada in the "C" Canadian-American League at a salary of $235 per month. Petitioner's name was kept off the unrestricted draft list for 1947 and 1948 by the respective assignments of his contracts to the "A" League clubs of Pueblo for 1948 and Greenville for 1949.

For 1947, no club outside of the Brooklyn organization in an "A", "B" or "C" League had the oppor-

tunity to draft or select petitioner; and for 1948 all like outside clubs in the "A" and "B" Leagues were deprived of such opportunities. This situation reduced materially petitioner's chances for reaching the Major or higher Minor Leagues. Petitioner's highest salary in organized baseball was $265 a month (R. 23, 24). Each Major League "Farm System" is a monopoly within a monopoly (R. 24).

An illustration of the "Reserve Clause" is the following:

Assume A is a player; he signs with Brooklyn. Under the reserve clause Brooklyn can:

Assign him to any club belonging to it anywhere;

At the conclusion of one year, it can tell A how much it will pay to him for the next; if A does not approve of the amount, A, though still unsigned, is still under the reserve clause: the chattel of Brooklyn; and he may not play anywhere in the baseball professional organization—which means anywhere for pay —without signing at Brooklyn's terms. In short, once the property of Brooklyn, A can play nowhere (and for no price), except that offered by Brooklyn. His right to deal with anyone else is forever barred unless Brooklyn sells him. In that sense he is "sold"; for he need be under no contract at all, yet may be sold. The club buying A is the only club for whom or at whose direction he can play at all; and he must accept its terms of pay or be forever barred through blacklist from playing at his profession.

At bar, the petitioner was kept at ceiling pay of the low-price Minor League "Farm Clubs" belonging

to Brooklyn; and was kept from being obtained in accordance with certain draft or selection rules of the defendants by Major League clubs paying higher salaries. The short point is, that petitioner was not given a fair opportunity for promotion; could not obtain any real promotion from the club of which he was the chattel; and for a definitive period was absolutely deprived of any opportunity to become the chattel by draft, sale or assignment of any other club paying or willing to pay commensurately with his ability.

And all this without the necessity of the Brooklyn club having any contract with petitioner. He was tied to it in perpetuity, for the sole reason that he had originally been purchased by Brooklyn from a club called Lockport with whom he had signed for a short period of time while still under twenty-one. Thus the defendants by organizing themselves into leagues of interlocking ownership, have control as a chattel of the players; vis a vis the player signed or unsigned and sell them as chattels. And they obtain munificent and rapidly growing revenues from radio and television broadcasting of the activities of such players' services without liability to any control thus far by Congress or Court, on the sole ground claimed by them that they are not engaged in interstate commerce and that their added revenue from the intervening perfection of radio and television for commercial purposes since the *Federal Baseball Club* case, *infra*, is not interstate commerce. That is the sole question proposed for review; and upon which, the Courts of Appeal for the Second and Sixth Circuits have differed.

In consequence of the injury inflicted upon petitioner in his business by defendants' conspiracy in restraint of trade and their overall and internal monopolies, petitioner brought this action for treble damages in pursuance of Section 4 of the Clayton Act, 38 Stat. 731, Section 4 (15 U. S. C. A., Section 15), on June 21, 1951 in the United States District Court, Southern District of Ohio, Western Division (R. 1).

The defendants, respondents, moved to dismiss the petitioner's complaint on the grounds that the Court lacked jurisdiction over the subject-matter of the cause of action, and that the complaint, and each cause of action therein, failed to state a claim against defendants upon which relief could be granted (R. 25-27).

The District Court granted the defendants' motion and dismissed the plaintiff's, petitioner's, action on January 25, 1952 (R. 29). On February 20, 1952, plaintiff, petitioner, filed notice of appeal to the United States Court of Appeals for the Sixth Circuit from the order of dismissal of the District Court (R. 31). On February 20, 1953, the Court of Appeals affirmed the order of the District Court dismissing petitioner's action (R. 35).

II.

Jurisdictional Statement.

(a) Statutes Giving Jurisdiction.

Plaintiff, petitioner, asserts that the defendants are in violation of the Anti-Trust Statutes.

Sherman Anti-Trust Law, 26 Stat. 209, Par. 1, 15 U. S. C. A., Section 1:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * *."

Sherman Anti-Trust Law, 26 Stat. 209, Par. 2, 15 U. S. C. A., Section 2:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be guilty of a misdemeanor, * * *."

In consequence of the conduct of the defendants, plaintiff, petitioner, has been injured in his business and therefore brings this action for treble damages under Section 4 of the Clayton Act, 38 Stat. 731, Section 4, 15 U. S. C. A., Section 15:

> "Any person who shall be injured in his business or property by reason of anything forbidden

in the antitrust laws may sue therefor in any district court of the United States in the district in which the Defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, for the cost of suit, including a reasonable attorney's fee."

The District Court on defendants' motion, dismissed plaintiff's, petitioner's, action on the grounds that it lacked jurisdiction of the subject matter of the complaint and on the further grounds that the complaint does not, nor does any cause of action therein set forth, state a claim upon which relief can be granted.

In accordance with the statute, Title 28, U. S. C. A. 1291, plaintiff, petitioner, appealed the final order of dismissal of the District Court of the United States Court of Appeals for the Sixth Circuit. On February 20, 1953, the United States Court of Appeals for the Sixth Circuit affirmed the order of dismissal and said order was entered on that day.

The jurisdiction of the United States Court to review the matter on certiorari is invoked under statute Title 28, U. S. C. A., Sections 1254 and 2101 (c).

In this case the United States Court of Appeals for the Sixth Circuit has rendered a decision in conflict with the decision of the United States Court of Appeals for the Second Circuit on the same matter (Supreme Court Rule 38, par. (5) (b)). In the case of *Gardella* v. *Chandler*, 172 F. 2d 402, the United States Court of Appeals for the Second Circuit held that the complaint therein raised issues of

fact as to whether or not organized professional baseball was engaged in interstate commerce and subject therefore to the Anti-Trust Acts of the United States by reason of the sale by the clubs of the rights to broadcast and telecast the games. In this case the United States Court of Appeals for the Sixth Circuit in affirming the order of dismissal of the District Court has held that organized professional baseball is sport, not trade, the business of giving exhibitions of baseball are purely State affairs and not subject to the Anti-Trust Laws of the United States. In rendering its decision in this case, the Court of Appeals for the Sixth Circuit avoided any doubt that its decision was in direct conflict with the decision of the United States Court of Appeals for the Second Circuit on the same matter. This conflict was plainly indicated by the reliance of the Court of Appeals for the Sixth Circuit upon the following passage from the dissenting opinion in *Gardella* v. *Chandler, ibid.*, which it quoted in its order:

> "'In dealing with such a unique aggregate as organized baseball and with a decision in respect to it which seems to be directly in point on the facts, we should not be astute in seeking to anticipate that the court which has the power to do so will change that decision. To do so would not only be an unwarranted attempt to usurp the authority of that court but would make its task in general much more difficult since it would lead to a constant alteration in the lower courts of its decisions on specific fact situations in the light of what would appear to be differing rules stated in the course of deciding later cases on different facts.'"

It is most respectfully submitted that the Court of Appeals for the Sixth Circuit in addition to adopting a specific ground for the grant of certiorari provided by Supreme Court Rule 38, par. (5) (b) has invited such review.

In this case the United States Court of Appeals for the Sixth Circuit has decided a federal question in a way that is probably in conflict with the applicable decisions of this Court. Over 30 years ago this Court decided in *Federal Baseball Club* v. *National League*, 259 U. S. 200, that professional baseball, or the business of giving exhibitions of baseball, are purely State affairs and that any interstate activity is a mere incident not the essential thing—and therefore professional baseball was not subject to the Federal Anti-Trust Laws. Recent decisions of this Court interpreting the scope of the commerce clause in the Federal Constitution show that that case can no longer be followed beyond its own facts (*Lorain Journal* v. *United States*, 342 U. S. 143).

Regardless of the validity of the *Federal Baseball Club* case on its own facts, the economic importance that professional baseball has attained and is progressively enhancing by taking advantage of the modern technological developments in radio and television as advertising media for interstate and international industries has so transformed the role of professional baseball in its business of giving exhibitions of baseball that the decision is no longer applicable to professional baseball. The positive authority of a decision is coextensive only with the facts upon which it is made (*Osaka Shosen Line* v. *United States*, 300 U. S. 98, 103; *Ogden* v. *Saunders*,

12 Wheat. 213; *Cohens* v. *Virginia*, 6 Wheat. 264, 399). Thus following the *Federal Baseball Club* v. *National League, supra*, without distinction as to the facts created by radio and television, gives a decision that is in conflict with the present applicable decisions of this Court.

Regardless of the validity of the *Federal Club* case on its own facts, the unlimited application of the uniform contract by the Major League Clubs as a binding obligation enforceable against the players in the Major League Clubs and on their Minor League Farm Clubs by the extra-judicial sanction of a blacklist, confers upon professional baseball an absolute monopoly over the labor market for professional players upon an international scale. The interstate transportation of the Major and Minor League clubs in fulfilling the season's schedules under these circumstances has become an integral part of interstate commerce and not a mere incident of local exhibitions that are purely state affairs. For this reason, the decision in *Federal Baseball Club* v. *National League, supra*, has ceased to have validity (*Cohens* v. *Virginia, supra*). The analysis of the *Federal Baseball Club* case discloses that the Major League clubs claimed the right to reserve 22 men, its necessary quota, and no more (*Federal Baseball Club*, Record on Appeal, f. 692). This fact is the premise for the decision (*National League, etc.* v. *Federal Baseball Club*, 269 F. 681, 687, 688). These players were free to "jump" the reserve (Record on Appeal, ff. 695, 696, 736, 740, 741, 783-784, 805). The right to "farm" was prohibited (*ibid.*, ff. 141, 208). Before this Court, the honorary nature of the reserve clause, the helplessness of the clubs to enjoin reserve clause and con-

tract "jumpers" alike and the strict numerical limitation of 22 players imposed upon the Major League clubs were the crux of baseball's argument to sustain the decision of the Court of Appeals (Brief of defendants in error, pp. 22-23, 64-65). Mr. Justice Holmes held for this Court that that decision went to the root of the case (259 U. S., *supra*, 208) and that the Leagues induced "free persons" to cross state lines (*ibid.*, 209). The Congressional Subcommittee has stressed the oppressive effect of the reserve clause as now construed upon the Minor League players who form the vast majority (Report, 118, 119, 159, 228, 229). This bears out the opinion of Judge Frank in the *Gardella* case, *supra*.

Clearly, the question presented as to radio and television is of importance in the administration of the anti-monopoly statutes of the United States; especially, as these rights are sold in combination with the power of the clubs to engage their players under servitude contracts. Settlement of the question by this Court of whether the sale for substantial amounts of the rights to broadcast and telecast a game or sporting event constitutes trade or commerce is plainly in the public interest, since it is likely to be presented in almost every federal anti-trust proceeding against the representatives and administrators of a widely popular sport in the United States; at the exhibitions of which, fees for admissions are charged (Complaint, par. 28(c) (2); par. 28 (c) (3); *United States* v. *International Boxing Club of New York, Inc.*, Civil No. 7481, S. D. N. Y., Filed March 17, 1952; Complaint, *United States* v. *National Football League*, pars. 8, 9, 10, 11, 12, 13, Civil No. 12808, E. D. Pa., Filed October 9, 1951).

Clearly, the question presented as to the introduction of a binding right of reservation in the uniform contract, to which the players are subject while their clubs are systematically transported across state lines in fulfilling the season's schedule and the right to their future professional services is similarly subject to assignment, is of importance in the administration of the anti-monopoly statutes of the United States. Settlement of the question by this Court of whether the transportation of the clubs under such contracts constitutes trade or commerce is plainly in the public interest since it is likely to be presented in every federal anti-trust proceeding against the representatives and administrators of a professional sport conducted by contests between teams that fulfill a schedule (Brief of National Hockey League with Appendices [Hearings, 1454-1471; see page 1462 for "reserve" clause in its uniform contract]).

III.

The Question Presented.

Only one question is presented by this petition. That is whether the United States District Court has jurisdiction of the subject matter of this action. In direct application are the activities and organization of professional baseball as set forth in plaintiff's, petitioner's, complaint subject to the Federal Anti-Trust Laws.

IV.

Reasons Relied Upon for the Allowance of the Writ.

(1) In this case the United States Court of Appeals for the Sixth Circuit has rendered a decision which is in conflict with the decision of the United States Court of Appeals for the Second Circuit (*Gardella* v. *Chandler*, 172 F. 2d 402).

(2) In this case the United States Court of Appeals for the Sixth Circuit has decided the question of the scope of the commerce Clause in a way probably in conflict with the applicable decisions of this Court.

(3) The Congress of the United States believes that organized professional baseball is not beyond the Federal jurisdiction. This belief is in conflict with the decision of the United States Court of Appeals for the Sixth Circuit in the case at bar. On page seven of the report of the Sub-Committee on Study of Monopoly power of the Committee on The Judiciary House of Representatives Eighty-Second Congress Second Session (hereinafter referred to as the "Report"), it is stated:

> "After full review of all of the foregoing facts and with due consideration of modern judicial interpretation of the scope of the commerce clause, it is the studied judgment of the Subcommittee on the Study of Monopoly Power that the Congress has jurisdiction to investigate and legislate on the subject of professional base ball."

(4) The Congress of the United States believes that legislation is necessary and proper to safeguard the

reasonable application of the reserve clause after the reasonableness of the reserve rules has been tested by the courts (Report, 231-232). This belief is in conflict with the decision of the United States Court of Appeals for the Sixth Circuit in the case at bar.

(5) Baseball is America's national pastime. On July 31, 1951, the Subcommittee on the Study of Monopoly Power knew of eight treble damage actions against various representatives of organized baseball seeking damages totaling several million dollars. Those in control of professional baseball assert that the great American pastime cannot continue should any of these actions be successful.

(6) Petitioner's points are contained in the separate opinions of Judge Learned Hand and Judge Frank in *Gardella* v. *Chandler, supra,* and it would be a task of supererogation, if not of presumption, to endeavor to improve upon them. The only distinction between their conclusion and that of the Court of Appeals for the Sixth Circuit rests in the alleged similarity between broadcasting and telecasting in contrast to wire service. It may be noted that the revenues from this service went solely to the Leagues and were a trivial $18,000 per annum for five seasons without any increase (*Federal Baseball Club* Case, Record on Appeal, ff. 442-447). Against this type of communication, radio and television do or permit the following:

(a) Exhibit or convey regularly and simultaneously the play by play action on the field;

(b) Send such exhibitions over all state lines with a unified signal or beam or their equivalents;

(c) Advertise at intermittent intervals and also between innings products for widespread consumption such as cigarettes, chewing gums, beer and beverages; all of which are admittedly manufactured, sold and distributed by national merchants in national and frequently international markets;

(d) Revenues from the direct transmission of the sights and sounds of the games that are commensurate with the receipts derived by the clubs from spectators; and that are rising sharply, while fees for admissions show their customary decline in a period of war (Hearings, 1616). The income of the Major League clubs for 1950 from radio and television was 10.5% of their total income; while, for 1951, the income from radio and television attained at a minimum estimate $4,561,312.50, inclusive of $1,075,000 for the World Series and $110,000 for the All Star Game (Report, 6);

(e) Demonstrably, ten times more spectators, viewers and auditors are provided by radio and television than from admissions to the parks;

(f) These spectators, besides furnishing a source of market for the advertised product are also a potential source of revenue by virtue of the circumstance that defendants are well aware of the progress of the art of television which will permit a charge to be exacted from such viewers. This potential market has been widely discussed and expertly surveyed in the interests of college and professional sports. A decision of this Court exempting professional baseball from the anti-monopoly statutes, after it has been

the only sport that has ever been subjected to an exhaustive congressional investigation with a resulting recommendation that the United States Courts pass upon the reasonableness of its contractual structure with respect to its performers, will be a clarion call for lucrative and monopolistic traffic in telecasting.

To summarize, the analogy founded upon a technical legal conception between the wire serve and radio and television is opposed to the practical interpretation of the commerce clause drawn from the course of business (*Swift and Company* v. *United States,* 196 U. S. 375). The comparison from a commercial standpoint is that of the ox cart to the jet plane, and is in as clear a contrast to the facts of the *Federal Baseball Club* Case as are the modern players to the "free persons" defined by Mr. Justice Holmes for this Court. His condemnation of the attempted expansion of *Lumley* v. *Wagner,* 1 De G. M. & G. 604 at *nisi prius* in Massachusetts illuminates the meaning in this respect of the *Federal Baseball Club* case, *supra* (Case Note on *Rice* v. *D'Arville,* 8 Harvard Law Review, 172). This does not have to be overruled since state regulation of professional baseball is now impracticable (Report, 7); and changes in science, *mores,* social outlook and the enlarged operations of the defendants have altered the predicates upon which the *Federal Baseball Club* case was decided.

The brief submitted in *Toolson* v. *New York Yankees, Inc., et al.,* Docket No. 647, is otherwise relied upon to support this petition; particularly, for the reason that it emphasizes the significance as a matter of constitutional interpretation of the inter-

vening concurrence by the Congressional Subcommittee in the conclusion reached by Judge Learned Hand in *Gardella* v. *Chandler, supra.*

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Court of Appeals for the Sixth Circuit had in the case numbered and entitled on its Docket, No. 11624, *Walter J. Kowalski, Plaintiff-Appellant* v. *Albert B. Chandler, Individually and as Commissioner of Baseball, et al.; Defendants,* to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said United States Court of Appeals for the Sixth Circuit be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated, March 19, 1953.

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